Supreme Court, U.S.
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No. 04-

In the
Supreme Court of the United States

EDWARD MICHAEL SHAIEB,
Petitioner

v.

PEOPLE OF THE STATE OF MICHIGAN
Respondent

On Petition for a Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court Should Grant the Writ, Vacate the Decision of the Michigan appellate courts and Remand for Consideration in Light of *Blakely* and the Court's expected decision in the pending cases of *United States v. Booker*, Case No. 04-0104, and *United States v. Fanfan*, Case No. 04-105.

II. Whether this Court Should Grant the Writ, and consider issues raised in *Blakely, Booker* and *Fanfan* in the context of a state sentencing scheme which raises the same issues as raised in these cases?

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Edward Michael Shaieb respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Michigan Supreme Court entered in this cause on June 10, 2004. App. 12a.

OPINIONS BELOW

The opinions of the Michigan Supreme Court and the Michigan Court of Appeals were not published. They are reprinted in the appendix hereto ("App.") at 1a; 12a. Excerpts of the sentencing proceedings are unreported and are reprinted at App. 27a.

JURISDICTION

The Michigan Supreme Court entered judgment in this case on June 10, 2004. App. 12a. The jurisdiction of the Michigan Court of Appeals was based on MCR 7.203. The jurisdiction of the Macomb County Circuit Court was based on MCL 767.1. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment, as interpreted by *Blakely v. Washington*, 124 S.Ct. 2531 (2004), is involved and is included in the Appendix at App. 38a.

MICHIGAN SENTENCING GUIDELINES INVOLVED

The case involves the following sentencing guidelines which are set forth in pertinent part at App. 18a-App. 23a: OV-6 (Multiple Victims); OV-7 (Exploitation of Victim Vulnerability); and OV-13 (Psychological Injury to Victim). Also involved are the resultant grids set forth in pertinent part at App. 24a.

INTRODUCTION

The case presents the same question presented to this Court in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), decided on June 24, 2004. The Petitioner's case is on direct appeal and the *Blakely* holding is thus applicable to this Petition. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The Petitioner had been found guilty after trial of Criminal

Sexual Conduct in the first and second-degrees. The complainants were two friends of the Petitioner's daughter. The Petitioner was convicted of one count of First-Degree Criminal Sexual Conduct and three counts of Second-Degree Criminal Sexual Conduct (two counts as to each complainant).

At sentencing, the Respondent determined the range of the Petitioner's minimum sentence by using the Michigan Sentencing Guidelines. At the original sentencing, the Respondent determined that the offense variables for multiple victims, vulnerable victims, and psychological injury to the victims applied. This determination required the Respondent to make factual findings over and beyond those facts implicated by the verdict or admitted by the Petitioner.

An additional factual finding was also made with respect to the vulnerable victim variable. The guidelines, as set forth at App. 20a-24a, stated that 5 points should be scored if the victim was exploited based upon "a difference in size/strength or because the victim was intoxicated, under the influence of drugs, asleep, or unconscious". However, 15 points were to be scored if the victim was exploited "due to a physical disability, mental disability, youth, agedness, or an abuse of authority status".

At the Petitioner's original sentencing hearing, the pre-sentence officer scored 10 points for multiple victims, 15 points for vulnerable victim, and 5 points for psychological injury with respect to the most serious offense (First-Degree Criminal Sexual Conduct). The Petitioner's prior record score was B, because although he had no prior record, he was convicted for multiple offenses. 30 offense variable points was scored as a III. App. 23a. The grid for B-III indicated that the minimum sentence should be between 96 and 180 months. The applicable statute for the most serious offense, MCL 750.520b, set the maximum sentence at life or any term of years. On January 18, 2001, the Petitioner was sentenced to 108 to 240 months in custody for the most serious offense.

As to the lesser offenses (Second-Degree Criminal Sexual Conduct), the pre-sentence officer scored 10 points for multiple victims and 15 points for vulnerable victim. App. 20a-24a. This scoring also placed the Petitioner in a B-III grid. The grid for B-III for the lesser offense indicated that the minimum sentence should

be between 24 months and 60 months. App. 24a The applicable statute for the lesser offense, MCL 750.520c, set the maximum sentence at 15 years. On January 18, 2001, the Petitioner was sentenced to 60 months-180 months in custody for each of the three lesser offenses. All sentences were run concurrently with each other.

While his appeal was pending, the Petitioner filed a Motion challenging the scoring of OV-6 (multiple victims). The Petitioner's position was that this variable should not be scored. On July 3, 2001, the trial court agreed and ordered that the Petitioner be resentenced. App. 32a.

The presentence officer reduced the total offense scoring by 10 points for the most serious offense. This changed the Petitioner's grid from B-III to B-II and his guidelines for the minimum sentence from 96 months to180 months to 36-96 months. App. 23a-24a.

A similar scoring for the lesser offense would have reduced the scoring for the minimum sentence from 24 months to 60 months (B-III grid) to 12 months to 36 months (B-II grid).

On August 22, 2001, the trial court re-sentenced the Petitioner to 96 months to 240 months for the most serious offense. The trial did not change the Petitioner's sentence for the lesser offenses. Accordingly, those sentences remained at 60 months to 180 months. As before, all sentences ran concurrently with each other.

The elements of First-Degree and Second-Degree Criminal Sexual Conduct are set forth at App. 15a; 16a. To find guilt, a jury is not required to determine the number of victims, the vulnerability of the victims, the degree of that vulnerability, or whether the victims suffered psychological injury.

In *Blakely*, this Court held that facts which resulted in the enhancement of a criminal defendant's sentence must be found by a jury, and that a judge, in a determinate sentencing system, could not increase a criminal defendant's sentence using judicial fact-finding.

As set forth in more detail *infra*, the federal Circuit Courts have sharply split over the applicability of *Blakely* to the United

States Sentencing Guidelines. Among the seminal concerns are whether *Blakely* applies to the Guidelines, and, if so, whether the Guidelines are unconstitutional *in toto* or whether any unconstitutional provisions can be severed.

This Court has recognized the seriousness of this issue, and, on August 2, 2004, this Court granted certiorari to two federal Petitioners. *United States v. Freddie J. Booker* (Case No. 04-104) and *United States v. Ducan Fanfan* (Case No. 04-105). The case is to be fully briefed by September 27, 2004, and oral argument has been set for October 4, 2004.

As set forth in more detail *infra*, the appellate courts of various states are also divided about the impact, if any, of *Blakely* on their sentencing schemes.

This Court should hold this Petition in abeyance, pending a decision by this Court in *Booker* and *Fanfan*. Once that decision has been made, the Court should grant the petition, vacate the judgment below, and remand the case for further consideration regarding *Blakely's* effect on the Michigan Sentencing Guidelines. This Court utilized the GVR procedure after *Blakely* in *Dilts v. Oregon*, 124 S.Ct.. 2906 (2004). That same decision should be made in the Petitioner's case.

In the alternative, the Court should grant the petition and decide the important question presented on which the federal and state courts of appeal are divided. *See*, S.Ct. Rule 10(a).

STATEMENT OF THE CASE

The complainants were friends of one of the Petitioner's daughters. The complainants would regularly sleep over at the Petitioner's home, sharing a bed with the Petitioner's daughter. In 1998, the two complainants accused the Petitioner of entering his daughter's bedroom and inappropriately touching them. One of the complainants claimed that on a single occasion, the Petitioner digitally penetrated her vagina. These events allegedly occurred between October of 1993 and the Spring of 1994. At that time, both complainants were under 13 years of age.

In 1999, the Petitioner was charged with four counts of

Criminal Sexual Conduct, two counts with respect to each complainant. One count, which related to the alleged digital penetration, was charged as First-Degree Criminal Sexual Conduct. The other three counts, which related to the alleged touching, were charged as Second-Degree Criminal Sexual Conduct.

The cases were consolidated, and the Petitioner was tried in 2000. On December 8, 2000, the Petitioner was convicted by a jury on all counts.

Michigan's sentencing scheme requires the imposition of a minimum and a maximum sentence. The maximum sentence is set by statute. By contrast, the minimum sentence is set using the Michigan Sentencing Guidelines. At the time of the offense, the Guidelines were based upon an Administrative Order of the Supreme Court of Michigan. Administrative Order 1988-4. The Michigan Legislature has since enacted its own Guidelines, which became effective as of December 15, 1998. MCL 777.1, *et. seq.*. The judicial guidelines were used to compute the Petitioner's minimum sentence.

The minimum sentence is very significant in terms of any criminal defendant's punishment, in that the minimum sentence determines that defendant's eligibility date for release by parole. MCL 791.234, *et. seq.* Thus, a higher minimum sentence means that the criminal defendant will remain incarcerated for a longer period of time before that defendant will be considered for release. By contrast, the maximum sentence set by statute is usually illusory in terms of the actual punishment which a criminal defendant receives.

Administrative Order 1988-4 directed that every sentencing judge complete a "sentencing information report". That report computed the guidelines for the minimum sentence using various variables to determine a prior criminal history score and an offense variable score. A grid was then consulted to determine the range for the minimum sentences. The applicable variables and grids are set forth at App. 18a-24a.

As set forth *supra*, the trial judge used the Guidelines to determine both the Petitioner's original minimum sentence and his

amended minimum sentence. As also described *supra*, the sentencing range determined by the Guidelines required findings of fact. These findings were initially made by the author or the presentence report and were ultimately confirmed or modified by the sentencing judge.

In the Petitioner's case, factual determinations were made about the number of victims, whether the vulnerability of the victims was exploited, the degree of any such exploitation, and whether the victims suffered psychological injury as a result of the offense.

The elements for First and Second-Degree Criminal Sexual Conduct are set forth at App. 15a; 16a. Those elements do not include any of these factors. Accordingly, the Petitioner's minimum sentence and minimum punishment were increased based upon factual findings that were not made by a jury or admitted to by the Petitioner.

The difference is meaningful. Since the jury had not found any of the facts used to increase the Petitioner's punishment, the Petitioner's offense variable score, after *Blakely*, would arguably have been zero. His Guidelines for the most serious offense would have been reduced to 24 months to 84 months and to 0 months to 36 months for the lesser offenses. App. at 15a; 16a. Both of these Guideline ranges are below the actual minimum sentences imposed (96 months and 60 months respectively).

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Same Issues That this Court Addressed on June 24, 2004 in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). *Blakely* Applies to the Petitioner Because His Case Is on Direct Appeal. This Court Should Grant the Writ, Vacate the Decision of the Michigan appellate courts and Remand for Consideration in Light of *Blakely*.

The issue presented in the Petitioner's case is identical to the issue addressed by this Court in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Specifically, the Petitioner's sentence was significantly enhanced based upon judicial findings of fact. The judicial-

ly-found facts were not alleged in the indictment, were not found by a jury, and were not admitted by the Petitioner.

The Michigan appellate courts did not consider *Blakely* when they decided the Petitioner's case because *Blakely* had not yet been decided. Indeed, following *Blakely*, a majority of the justices of the Michigan Supreme Court opined in dicta that *Blakely* did not apply to the Michigan Sentencing Guidelines. *People v. Claypool*, 470 Mich 715, 684 N.W.2d 278 (2004). Subsequent decisions of the Michigan Court of Appeals have reached the same outcome. *People v. Roberts*, 2004 WL 1837670 (COA, 8/17/04); *People v. Krause*, 2004 WL 1779068 (COA, 8/10/04). Thus, even if *Blakely* had been decided before the Michigan Supreme Court denied the Petitioner discretionary review, any *Blakely* claim made by the Petitioner would have been rejected by the Michigan Courts.

Blakely applies to the Petitioner because his case is still on direct appeal. *See, Griffith v. Kentucky*, 479 U.S. 314 (1987).

Because this case squarely presents the question addressed in *Blakely*, one option would be for this Court to grant the petition and remand this case to the Michigan Supreme Court for further consideration in light of *Blakely*. In the alternative, this Court could hold this case in abeyance pending the resolution of the two cases where certiorari has been granted. *United States v. Freddie Booker*, Case No. 04-104 and *United States v. Ducan Fanfan*. Case No. 04-105.

As this Court recently observed, "the GVR order has, over the past 50 years, become an integral part of th[e] Court's practice, accepted and employed by all sitting and recent Justices." *See, Lawrence v. Chatter*, 516 U.S. 163 (1996). The most common of the "wide range of developments" in light of which this Court typically exercises its GVR authority is an intervening decision of this Court which the court below could not have fully considered, which could cause the lower court to reject a "premise" on which its ruling was based if given the opportunity for further consideration, and which could determine the "ultimate outcome of the litigation". *Id.* at 165-166. In criminal cases, such as this, this Court's practice of remanding cases in these circumstances is perhaps even more firmly rooted. *See, Stutson v. United States*, 516 U.S. 193 (1996).

A GVR order is plainly an option here: the Michigan Supreme Court could not have anticipated this Court's ruling in *Blakely*. Once faced with the ruling, the Michigan Supreme Court and the Michigan Court of Appeals have taken the position that *Blakely* does not apply to the Michigan sentencing scheme.

It is the Petitioner's position that the Michigan Supreme Court has misinterpreted *Blakely*. The validity of the Petitioner's position and the position taken by the Michigan Supreme Court will likely be affected, if not determined, by this Court's decision in *Booker* and *Fanfan*.

If this Court concludes that *Blakely* applies to sentences determined by Guidelines and judicial fact-finding, the Petitioner's ultimate sentence would have been unconstitutionally determined.

Thus, if this Court agrees, a GVR order would be appropriate under this Court's well-established precedents.

This Court has granted a GVR order in at least one other state case raising similar issues, a fact which also supports the Petitioner's request. Thus, in *State v. Dilts*, 336 Or. 158, 82 P.3d 593 (2003), the Oregon Supreme Court concluded that *Apprendi* did not apply to the presumptive term of imprisonment as determined by Oregon's sentencing guidelines, and that judicial fact finding was permitted as long as the statutory maximum sentence was not exceeded. This Court vacated that decision and remanded for re-consideration in light of *Blakely*. *Dilts v. Oregon*, 124 S.Ct. 2906 (2004).

II. In the Alternative, this Court Could Grant the Petition and Consider on the Merits Whether *Blakely* Applies to the Michigan Sentencing Guidelines And, If so, Whether the Guidelines Are Unconstitutional *in Toto* or Whether the Unconstitutional Sections Can Be Severed and/or Hold the Petition in Abeyance Pending the Resolution of *Blakely's* Scope in *Booker* and *Fanfan*.

In *Blakely*, Blakely had pled guilty in a Washington state court to kidnaping his wife. As part of the plea, Blakely had admitted to the elements of the second-degree kidnaping, domestic violence, and firearms charges to which he had pled guilty. He did not admit to any other facts.

The State of Washington has a determinate sentencing scheme. The charges carried a sentencing range of 49-53 months. However, a sentencing judge was authorized to impose a sentence above that range if that judge found "substantial and compelling reasons justifying an exceptional sentence". The judge ultimately increased the defendant's sentence to 90 months, based on a finding of "deliberate cruelty", a fact to which the defendant had not admitted.

This Court, relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), held that a sentencing judge exceeds his or her "proper authority" when that judge "inflicts punishment that the jury's verdict alone does not allow".

This Court also opined that the principle it announced in *Blakely* applies whether the sentencing system requires the sentencing judge to find a specific fact, one of several specified facts, or any aggravating fact.

In a footnote, this Court noted that the United States had appeared as *amicus curiae* and had urged this Court to affirm. The United States had argued that there were no constitutionally significant differences between Washington's guidelines and the United States Sentencing Guidelines. This Court declined to express an opinion because the United States Sentencing Guidelines were not before the Court.

As to guilty plea cases, this Court stated that the prosecution "is free to seek judicial sentencing enhancements so long as the defen-

dant either stipulates to the relevant facts or consents to judicial factfinding".

In her dissent, Justice O'Connor, citing the United States Sentencing Guidelines and statutes from a number of states, including Michigan, opined that *Blakely* "casts constitutional doubt over them all". In his dissent, Justice Breyer echoed many of these same concerns. Justice Breyer called for further argument about his concerns so that more certainty can be attained about how *Blakely* affects other sentencing schemes.

Both federal and state courts have sharply split over the questions of whether *Blakely* applies to their respective sentencing schemes and if so, how sentences should be determined.

On July 20, 2004, the Michigan Court of Appeals decided *People v. Motten*, 2004 WL 1620813 (2004). Citing *Blakely*, the defendant argued that his sentence was unconstitutionally enhanced using facts not found by the jury. The Court of Appeals noted that the issue had not been briefed, but deemed the *Blakely* claim of sufficient significance to remand the case to the trial court for reconsideration of the sentence in light of *Blakely*.

Two days later, the Michigan Supreme Court decided *People v. Claypool*, 470 Mich 715, 684 N.W.2d 278 (2004). *Claypool* involved the validity of a downward departure from the Michigan Sentencing Guidelines which had been granted by the trial court. *Blakely* had not been raised by the parties or briefed to the Court. However, a majority of justices expressed their opinion that *Blakely* does not apply to the Michigan Sentencing Guidelines. The majority of the justices reasoned that Michigan has an indeterminate sentencing scheme rather than the determinate sentencing scheme addressed in *Blakely*. The Court did not address the fact that the minimum sentence–the sentence which usually controls the punishment a defendant receives–is set in virtually the same manner that the sentence was computed in *Blakely*.

Subsequent decisions of Michigan's Court of Appeals have treated *Claypool* as a binding decision and have opined that *Blakely* does not apply to the Michigan Sentencing Guidelines. *People v. Roberts*, 2004 WL 1837670 (COA, 8/17/04); *People v. Krause*, 2004 WL 1779068 (COA, 8/10/04).

In *State v. Berry*, 2004 WL 1873706 (Sup. Ct. Tennessee, 8/23/04), the Supreme Court of Tennessee concluded that *Blakely* did not require the prosecution to charge aggravating factors in a murder case in the indictment. The Court explained that the jury's verdict is based on elements of the crime which have nothing to do with the aggravating factors. Rather, the aggravators only come into play when the state seeks to impose enhanced sentences of life without parole or death. The Court reasoned that the purpose of the indictment is to inform the defendant about the charges brought. The Court concluded that the aggravating circumstances are mere sentencing enhancements. Thus, it was the Court's opinion that *Blakely* did not require a jury determination about these factors.

Michigan and Tennessee appear to be the only states where the state's highest Court has addressed the applicability of *Blakely* to the state's sentencing scheme. Michigan addressed the issue broadly, while Tennessee narrowly addressed a single component of Tennessee's sentencing scheme. However, a number of other state courts have weighed in on the issue. Decisions are being made, however, on virtually a daily basis, supporting a decision by this Court to address the inconsistencies between the states as to how *Blakely* is to be interpreted.

In *State v. Parks*, 2004 WL 1936404 (Court of Criminal Appeal, Tennessee, 8/30/04), the defendant was convicted of various sexually related crimes involving his fifteen year old stepdaughter. The defendant had pled guilty. The sentencing court relied on two factors to enhance the defendant sentence: 1) the defendant had a prior record; and 2) the defendant abused a position of trust to facilitate the commission of the offense. The Court reversed for other reasons and instructed the sentencing court to consider any enhancement factors in light of *Blakely*.

In *Carson v. State*, 813 N.E.2d 1187 (COA, Indiana, 8/20/04), the Court noted that Indiana courts had not yet considered how *Blakely* affected the Indiana sentencing scheme. Judicially determined facts had increased the defendant's sentence. Those facts included a prior record including multiple convictions, a need for rehabilitation best provided by incarceration, and the strong likelihood of recidivism based upon the defendant's prior history. The

Court concluded that *Blakely* did not apply to the defendant's facts because all of the aggravators related to or were derived from the defendant's criminal history.

In *State v. Sawatzky*, 2004 WL 1987638 (COA, Oregon, 9/8/04), the defendant had facially attacked Oregon's sentencing guidelines as they related to upward departures. The defendant argued that any such departures were unconstitutional because they were based upon judicially findings. The Court explained that Oregon's sentencing scheme was based upon a grid, which was determined based upon one axis measuring prior criminal history and a second axis measuring the severity of the offense. The sentencing court could depart upwardly from the presumptive sentence determined by the grid for substantial and compelling reasons. The degree of an upward departure was statutorily limited to either double the presumptive sentence or the statutory maximum. The Court of Appeals concluded that *Blakely* applied and that the scheme for upward departures based on judicial fact finding was unconstitutional.

This reasoning is arguably contrary to the reasoning of the Michigan Supreme Court in that the scheme for determining the minimum sentence in Michigan is virtually identical to the Oregon sentencing scheme.

The California Supreme Court has granted review in two cases to explore the likely impact of *Blakely* on the California sentencing scheme. *People v. Towner* and *People v. Black*, Case Nos. S125677 (7/14/04) and S126182 (7/28/04) respectively. In California, a so-called "upper-term" sentence can be imposed if the sentencing judge finds that certain aggravating circumstances are present. The California Supreme Court granted review to decide what effect *Blakely* had on that state's sentencing scheme. The Supreme Court also granted review on the impact that *Blakely* had, if, any, on consecutive sentencing. At least one intermediate California Court has ruled that *Blakely* does not apply to consecutive sentences. *People v. Sykes*, 120 Cal. App. 4th 1331 (Division Five, 2004).

In *Sigler v. State*, 2004 WL 1562912 (Fla. App. 4 Dist., 7/14/04), the Court considered a *Blakely* challenge to a Florida statute which permitted an appellate court to enter a conviction for

a lesser-included offense, or a lesser degree of the same offense. At issue was whether the appellate court could enter judgment for a permissive lesser included offense. In Florida, such an offense does not have all of the elements of the greater offense that was the subject of the jury's deliberations. The Court reasoned that after *Blakely*, there must be a jury determination of guilt and that a judge's authority to sentence derives solely from that verdict. As a result, since the jury did not find all of the elements of the lesser offense, the appellate court could not enter a judgment. As a result, the Court declared that the statute violated the Sixth Amendment and was thus unconstitutional. The cause was remanded for a jury determination of the issue.

In *State v. Quinones*, 2004 WL 1903250 (Ohio App. 8 Dist., 8/26/04), the defendant pled guilty to one count of rape of a child under 13 and three counts of unlawful sexual conduct with a minor. Ohio law prior to *Blakely* allowed a sentencing judge to impose maximum prison terms based upon judicial findings. On review, the issue had been whether the sentencing judge had adequately articulated the findings and reasons for imposing the maximum prison terms. The Court of Appeals concluded that *Blakely* applied. No jury had decided that the defendant had committed the worst form of the offense or that he posed the greatest likelihood of recidivism. The defendant had not admitted to either fact. The Court vacated the defendant's sentencing and remanded for re-sentencing in light of *Blakely*. One judge dissented.

In *State v. Vance*, 2004 WL 1925143 (COA, Minnesota, 8/31/04), the defendant was convicted of four counts of Criminal Sexual Conduct and one count of Assault. The sentencing judge departed upwardly from the sentence that was otherwise determined by Minnesota's sentencing scheme. This double departure to 288 months was based on a number of judicial findings. Those findings related to the duration of captivity, particular cruelty in how the defendant treated the victim, multiple methods of penetration, violation of the victim's trust, and the presence of children when the offenses were committed. The appellate court declined to address the *Blakely* issue on the merits, but did remand the case to the sentencing court so that that Court could consider the issue first. Other panels of the Minnesota Court of Appeals have taken the

same approach. *State v. Krueger*, 2004 WL 1878998 (COA, Minnesota, 8/24/04); *State v. Henderson*, 2004 WL 1833939 (COA, Minnesota, 8/17/04); *State v. Heath*, 685 N.W.2d 48 (COA, Minnesota 8/10/04).

In sum, the state courts have interpreted the scope of *Blakely* in widely-divergent fashions. These interpretations range from declarations that *Blakely* doesn't apply at all, that *Blakely* doesn't apply to a particular component of the state sentencing scheme, that part of the state sentencing scheme is facially unconstitutional, that a jury should make a determination on remand, and that the defendant should be re-sentenced in light of *Blakely*.

This lack of consistency and confusion is likely to continue until this Court clarifies the application of *Blakely* to state sentencing schemes.

The lack of agreement on the scope of *Blakely* is also illustrated by the widely divergent reactions of federal trial and appellate judges. These divergent reactions mirror the inconsistent reaction of various state appellate courts.

For example, on July 7, 2004, some 13 days after the *Blakely* decision, Judge Cassell, sitting in the District of Utah, invalidated the United States Sentencing Guidelines. *United States v. Croxford*, 324 F.Supp.2d 1230 (D. Utah, 2004). In *Croxford*, the district judge concluded that the guidelines were not severable because severance would not achieve Congress' intent. The Court considered the guideline calculation, as modified by excluding unconstitutional aggravators and ultimately imposed a sentence within the guideline range.

A number of federal Circuit Courts have addressed the impact of *Blakely* on the Federal Sentencing Guidelines. Like the state courts, these decisions are not uniform. The reasoning of a number of the federal decisions is relevant to the instant Petition because many of the analytical concerns expressed by the federal courts mirror the concerns which are confronting the state courts.

For example, On July 12, 2004, the Fifth Circuit decided *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004). In *Pineiro*, the defendant had been convicted by a jury with being involved in

a marijuana and cocaine distribution conspiracy and with two substantive counts of drug possession with the intent to distribute. The defendant was sentenced according to the Federal Sentencing Guidelines. The defendant's sentence was enhanced based upon judicial findings regarding drug quantities and leadership.

The defendant appealed, and his appeal was pending when *Blakely* was decided. The Court's ultimate conclusion was that in the absence of an *en banc* determination or an on-point holding by this Court, it was required to adhere to settled law. In the Fifth Circuit, settled law was that the Guidelines were constitutional and that any sentence imposed by the Guidelines was permitted as long as that sentence did not exceed the maximum sentence established by Congress.

The Seventh Circuit addressed the issue in *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *certiorari petition granted*, 8/2/04, Case No. 04-104. In *Booker*, the defendant had been found guilty by a jury of a drug offense which carried a statutory minimum sentence of 10 years and a maximum sentence of life.

The defendant's sentence was enhanced by a judicial finding that the defendant was responsible for 566 grams of cocaine base over and beyond the amount of cocaine base necessarily found by the jury. There was an additional judicial finding that the defendant had obstructed justice. The judicial fact finding resulted in guidelines of 360 months to life and an ultimate sentence of 360 months.

The Court began its opinion by noting that *Blakely* had created an avalanche of activity as numerous defendants sought review of their sentences. The Court noted that only Congress and this Court can provide definitive guidance as to how the lower courts should proceed.

As did the Fifth Circuit, the Seventh Circuit opined that it was the definition of "statutory maximum" for *Apprendi* purposes that created the Sixth Amendment concerns for the Federal Sentencing Guidelines.

Unlike the Fifth Circuit, however, the Seventh Circuit did not simply apply prior precedent and leave the impact of *Blakely* to a definitive decision by this Court. Rather, the Seventh Circuit took

the analysis a step farther.

At the threshold, the Seventh Circuit could see no difference between the sentencing scheme used by the State of Washington and the sentencing regime implemented by the United States Sentencing Guidelines. The Sentencing Commission is fully accountable to Congress which can revoke or amend the guidelines as it sees fit, citing *Mistretta v. United States*, 488 U.S. 361, 377 (1989). The Seventh Circuit thus agreed with the views of the *Blakely* dissenters that the Federal Sentencing Guidelines were doomed after *Blakely*. Like those dissenters, the Seventh Circuit could find no constitutionally significant distinction between the Washington State sentencing system and the sentencing system mandated by the Federal Sentencing Guidelines.

The government had made the same argument to the Seventh Circuit that it had made to the Fifth Circuit, i.e. that "all the guidelines do is to regularize the discretion that judges would exercise in picking a sentence within a statutory range". The Seventh Circuit rejected that argument on the grounds that the "vices of the guidelines are thus that they *require* the sentencing judge to make findings of fact (and to do so using the wrong standard of proof)." (Emphasis in the original).

The Seventh Circuit also distinguished between allowing a sentencing judge to consider facts such as character, remorse, and health "and commanding him to make factfindings and base the sentence (within a narrow band) on them." The Seventh Circuit opined that the command is what was wrong with Washington State's sentencing system in *Blakely*.

The Seventh Circuit then noted that prior to judicial findings, the maximum sentence the judge could have imposed was 262 months. This maximum sentence was based on the quantity of cocaine base necessarily found by the jury and on the defendant's criminal history.

Based on its analysis, the Seventh Circuit concluded that the defendant had a constitutional right to a jury determination regarding the quantity of drugs and whether his conduct obstructed justice. The sentence was thus vacated and the cause was remanded for re-sentencing.

The Seventh Circuit also acknowledged that there was an issue about whether the unconstitutional aspects of the guidelines were severable or if, as argued by the government, the entire system of the guidelines "must fail". The Seventh Circuit stated that severability is an issue of legislative intent, citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The Seventh Circuit declined to reach the severability controversy because the issue had neither been briefed or argued as part of the instant appeal.

Because of the risk that the guidelines might be declared unconstitutional *in toto*, the Seventh Circuit stated that it would be prudent for the sentencing judge to impose a fall-back sentence.

Judge Easterbrook dissented on grounds similar to those advocated by the Fifth Circuit, reasoning that this Court should have the sole authority to set aside the Federal Sentencing Guidelines. Judge Easterbrook reasoned that the court's decision was its "own home-brewed formula and other courts are bound to favor different recipes as 900 district and circuit judges fumble for solutions. The Supreme Court alone can make a definitive judgment". Among other things, Judge Easterbrook believed that the guidelines were likely saved by *Edwards v. United States*, 523 U.S. 511 (1998) and that only this Court, as opposed to intermediate federal courts, could rule to the contrary. See, also, *United States v. Ward*, 377 F.3d 671 (7th Cir. 7/23/04) (Affirming *Booker* and remanding for determinations of contested aggravators by a sentencing jury).

On July 12, 2004, the *en banc* Second Circuit addressed the controversy in *United States v. Penaranda*, 2004 WL 1551369 (2d Cir. 7/12/04). The *en banc* Court was unanimously of the view that prior to taking a position on the interplay between *Blakely* and the Federal Sentencing Guidelines, the Court should certify questions to this Court, pursuant to 28 U.S.C. 1254(2).

The Second Circuit justified the certified questions by noting that there have been 220,000 federal sentences imposed since *Apprendi* was decided and that there was "the prospect that many thousands of future sentences may be invalidated or, alternatively that district courts simply will halt sentencing altogether pending a definitive ruling by the Supreme Court". The Second Circuit went

on to state that "[w]e are convinced that a prompt and authoritative answer to our inquiry is needed to avoid a major disruption in the administration of criminal justice in federal courts". Without such an authoritative answer, the Second Circuit envisioned courts sentencing under the guidelines as they have been doing since 1987 (essentially the Fifth Circuit's posture) or selecting alternative means for implementing *Blakely* (the Seventh Circuit's approach). Since both postures cannot be correct, this Court's ultimate decision could adversely affect literally thousands of defendants sentenced according to incorrect principles.

On July 14, 2004, the Sixth Circuit faced the issue in *United States v. Montgomery*, 2004 WL 1562904 (6th Cir. 2004). The panel declared the Federal Sentencing Guidelines unconstitutional *in toto*. The decision was vacated, however, and the appeal was ultimately dismissed. 2004 WL 1562904 (6th Cir. 2004); 2004 WL 1637660 (6th Cir. 2004).

The Sixth Circuit revisited the issue again in *United States v. Koch*, 2004 WL 1899930 (6th Cir. 8/26/04) *en banc*. This time the *en banc* majority concluded that *Blakely* did not apply to the Federal Sentencing Guidelines and ordered district judges within the Circuit to continue sentencing under the Guidelines as they had been doing before *Blakely*. The Court also recommended that judges impose alternative sentences so that mass re-sentencings would not be required should this Court reach a different outcome in *Booker* and *Fanfan*. 2004 WL 1899930 (6th Cir. 2004).

In *United States v. Marseille*, 366 F.3d 1249 (11th Cir. 7/21/04), the Court concluded that *Blakely* did not apply to fact-finding decisions about a defendant's prior criminal history, even though that fact-finding resulted in the defendant being classified as a career criminal and thus subject to a much higher sentence than he would have received without that determination. *Marseille* implicitly concluded that the Guidelines were not unconstitutional *in toto* because the Court used the Guidelines to review the defendant's sentencing challenges.

In *United States v. Mooney*, 2004 WL 1636960 (8th Cir. 7/23/04), the panel unanimously concluded that *Blakely* applied to the Federal Sentencing Guidelines. A majority of the panel con-

cluded that the Federal Sentencing Guidelines were unconstitutional. The third member of the panel concluded that prior precedent of this Court had validated the guidelines and that *Blakely* did not overrule those prior decisions.

The Eighth Circuit, however, did not resolve this difference of opinion among the judges. Rather, the case was remanded to the district judge for re-sentencing and for consideration of the bond motion. The panel withheld the mandate and retained jurisdiction so that the case could be re-appealed and re-visited once the district court had acted. This decision was vacated, however, when *en banc* review was granted. Unlike the Sixth Circuit, the Eighth Circuit has not yet ruled.

In *United States v. Ameline*, 376 F.3d 967 (9th Cir. 7/21/04), the defendant admitted to only trace amounts of drugs. At sentencing, the district judge made factual findings about the amount of drugs involved, determined that 1,603.6 grams of methamphetamine were involved in the defendant's offense behavior, and imposed a 150 month sentence.

The Ninth Circuit concluded that although *Blakely* applied, *Blakely* did not invalidate the Federal Sentencing Guidelines. Since the defendant's sentence had been enhanced based upon a judicial finding rather than upon the defendant's admissions or a jury finding, the cause was remanded to the district judge for re-sentencing.

After remand, the Ninth Circuit instructed that if the government chose to prove drug quantity and firearm related issues, a sentencing jury should be convened where these matters would have to be proven beyond a reasonable doubt.

A dissenting judge argued that the Guidelines were unaffected by *Blakely*, agreeing with the Fifth Circuit's opinion in *Piniero* and Judge Easterbrook's dissent in *Booker*.

In sum, there is a wide divergence among the federal courts regarding the impact of *Blakely* on the Federal Sentencing Guidelines.

Because the Petitioner's case is directly on-point to the controversy going on in the federal and state courts, because Petitioner's

case is on direct review, and because the split among federal and state jurists is deep and extraordinary, this Court should either grant certiorari and address the Petitioner's case on the merits or, alternatively, hold the Petitioner's case in abeyance until this Court has an opportunity clarify *Blakely* in *Booker* and *Fanfan*.

As to the specifics, the Petitioner submits that the Michigan Sentencing Guidelines are squarely within the ambit of the *Blakely* decision.

In the Petitioner's own case, judicial findings about victim vulnerability and psychological damage increased significantly his minimum sentence. The indictment alleged none of these aggravators, the Petitioner's jury conviction involved no necessary determination about any of these factors, and the Petitioner did not himself admit to any facts which would necessarily support the aggravators.

It is the Petitioner's position that the Michigan Supreme Court was wrong in *Claypool* and that *Blakely* does implicate the Michigan Sentencing Guidelines, whether they be the judicial or legislative guidelines.

At the threshold, *Claypool* was not about *Blakely* and the justices did not have the benefit of any briefing or argumentation. The dissenting judges made that very point and argued that a decision of this magnitude should not be made without the benefit of focused briefs and argument. *See, also, People v. Couch*, 684 N.W.2d 366 (2004) (dissenter reiterating view that the significance of the issue should have the benefit of "full briefing and oral argument").

As to the merits, the majority of the justices opined that Michigan has an indeterminate sentencing system, unaffected by *Blakely*. The Petitioner disagrees. In *Blakely*, this Court defined an indeterminate sentencing system as one where the sentencing judge had complete discretion to determine the sentence up to and including the statutory maximum. This definition described the sentencing scheme that existed in federal courts prior to the effective date of the Federal Sentencing Guidelines in 1987.

In Michigan, the sentencing judges are not free to impose a minimum sentence based solely upon their discretion. Rather, both

the judicial and legislative sentencing guidelines directed sentencing judges to compute the minimum sentence using a formula. That formula, as in the Petitioner's case, required the sentencing judge to make factual determinations about each of the offense variables. See App. at pp.18a-24a. These fact determinations were typically not found by a jury, necessarily implicated by a plea, or otherwise admitted by the defendant.

The maximum sentence may or may not be discretionary depending on the statute. For example, in the Petitioner's case, the maximum sentence for Second-Degree Criminal Sexual Conduct was set at 15 years by the Legislature. MCL 750.520c Thus, the Petitioner's sentencing judge was mandated by law to impose a maximum sentence of 15 years. By contrast, the First-Degree Criminal Sexual Conduct statute set the penalty at life or any term of years. MCL 750.520b. Thus, the sentencing judge had discretion to set the maximum penalty.

However, Michigan's parole statutes, e.g. MCL 791.234, make it clear that the maximum penalty-except in cases where parole is not authorized-do not control a criminal defendant's release date. Rather, the minimum sentence establishes a parole eligibility date and the actual date of release is thereafter committed to the sound discretion of the parole board.

Thus, it is the minimum sentence that actually establishes the punishment which a criminal defendant will receive. Since the sentencing judge is not free to set that sentence using only discretion, it is the Petitioner's position that, for *Blakely* purposes, the Michigan Sentencing Guidelines actually define a determinate sentencing system.

There is another aspect of the Michigan sentencing scheme which demonstrates that it is included within *Blakely's* ambit. Specifically, sentencing judges are authorized to depart upward or downward from the minimum sentence produced by the Guidelines if there are substantial and compelling reasons in support of such a departure. *See, e.g., People v. Claypool*, 470 Mich 715, 684 N.W.2d 278 (2004) (discussing departures) and *People v. Babcock*, 469 Mich 247, 666 N.W.2d 231 (2003). (Same)

As the two cited cases make clear, the determination of whether any particular factor exists is established by judicial fact-finding. The degree of departure is also based upon the facts found by the judge and the judge's subjective view about how serious those facts are.

It is the Petitioner's position that the departure analysis is squarely within *Blakely* because both the facts justifying departure and the degree of any such departure are not based on findings made by a jury, on facts necessarily part of a guilty plea, or on facts admitted by the criminal defendant.

For purposes of review by this Court, the issues presented by the Federal Sentencing Guidelines are remarkably similar to those presented by the Michigan Sentencing Guidelines. However, there are many different types of state sentencing schemes, and by granting certiorari in this case, this Court could give guidance to states as to how to square their differing sentencing schemes with *Blakely*.

In sum, this Court should grant certiorari to resolve the conflict among the state courts as to the interplay between *Blakely*, the Sixth Amendment, and the sentencing schemes employed by each of the states.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari. Alternatively, this Court could hold the Petitioner's case in abeyance until a decision is made in *Booker* and *Fanfan*. Once a decision is reached, the petition should be granted, the judgment vacated, and the case remanded for further consideration in light of this Court's decision.

Respectfully submitted,

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APPENDIX A

Court of Appeals of Michigan

PEOPLE of the State of Michigan,
Plaintiff-Appellee

v.

EDWARD M. SHAIEB, Defendant-Appellant

Nos. 232957, 236729

September 9, 2003

Before: WILDER, P.J. and FITZGERALD and ZAHRA, JJ.

[UNPUBLISHED]

PER CURIAM

A jury convicted defendant of one count of first-degree criminal sexual conduct, M.C.L. 750.520b(1)(a), and three counts of second-degree criminal sexual conduct, M.C.L. 750,520c(1)(a). The trial court originally sentenced him to concurrent terms of nine to twenty years' imprisonment for the first-degree CSC conviction and five to fifteen years each for the second-degree CSC convictions, but subsequently resentenced him to concurrent terms of eight to twenty years' imprisonment for the first-degree CSC conviction and five to fifteen years each for the second-degree CSC convictions. Defendant appeals as of right. In Docket 232957, he challenges the convictions. In Docket No. 236729, he challenges his sentences. We affirm.

I. Facts and Proceedings

Defendant's convictions arise out of allegations that, on four occasions, defendant sexually assaulted two of his youngest daughter's friends during sleepovers at defendant's family's home in 1993 and 1994. The victims, M.S. and N.J., were bot under thirteen years old when these incidents occurred. M.S. testified that on October 15, 1993, defendant entered the bedroom where she an defendant's youngest daughter were sleeping, pulled the covers off of M.S., reached insider her boxer shorts and underwear, and "rubbed" her buttocks. When she stirred, defendant left room. M.S. further testified that during another sleepover in the spring of 1994, defendant entered the bedroom where M.S. and defendant's daughter were sleeping, touched M.S.'s breasts, and reached under her boxer shorts and underwear and digitally penetrated her. Defendant again left the room when M.S. stirred.

N.J. testified that between October 1993 and February 1994, during a sleeepover with defendant's youngest daughter, N.J. awakened when defendant entered the bedroom whre she and his daughter were sleeping. She pretended to be sleeping while defendant walked over to the bed and "caressed" her buttocks. When she stirred, defendant left the room. Approximately one month later, a similar series of events occurred. Defendant's daughter slept through each of these four incidents.

Among the other witnesses at trial were Detective Linda Deprez, a police officer with the Sterling Heights Police Department who conducted interviews with the complainants in March 1998 after another officer filed the initial police report. Detective Deprez testified that on March 23, 1998, she went to the defendant's home as part of her investigation and found defendant's wife and daughter at home. Detective Deprez first spoke to defendant's wife and informed her of the allegations against defendant. Defendant arrived while Detective Deprez and his wife were talking and he heard the allegations against him. Defendant denied that the allegations were true and indicated to Detective Deprez that he wanted to "clear things up." Detective Deprez left her business card with defendant, but neither defendant nor his family members contact her. Defendant's wife testified that the defendant's attorney

instructed them not to contact the police. Defense counsel did not object to this line of questioning.

During closing argument, the prosecutor emphasized that defendant, his wife, and his daughter did not contact the police after Detective Deprez left her business card with them. Defendant objective to this argument claiming it violated defendant's Fifth Amendment right. Outside the jury's presence, defendant more specifically argued that the prosecutor's statements violated his Fifth Amendment right to remain silent. After hearing arguments on the issue, the trial court sustained the defendant's objection. [FN1] In an effort to cure the error, the trial court instructed the jury as follows in its final instructions:

> FN1. Although the trial court did not identify the legal basis for its decision, it is apparent from the record that the trial court concluded that the prosecutor's comments violated defendant's Fifth Amendment rights.

> You are not to consider the fact that defendant, defendant's wife, or defendant's daughter failed to contact the police or prosecutor's office after Detective Deprez' initial investigation. The defendant and his family have an absolute right not to do anything with regard to the People's investigation.

Subsequently, defendant moved for a mistrial on the same basis. The trial court denied defendant's motion, opining that the curative instruction remedied the violation. Defendant raised the issue again after the conclusion of the trial in a second motion for mistrial. The trial court again denied defendant's motion and explained its conclusion that the cautionary instruction provided adequate relief:

> I gave a curative instruction. I feel that the curative instruction was sufficient enough to inform the jury that he [defendant] did not have to do anything, and that he should not be held responsible. I am satisfied in my find [sic] that curative instruction was significant enough to place in that jury's mind the fact that he didn't have to do any[thing].

II. Standards of Review

We review the trial court's decision to grant or deny a motion for mistrial for an abuse of discretion. *People v. Dennis*, 464 Mich 567, 628 N.W.2d 502 (2001). We review issues of constitutional law de novo. *People v. LeBlanc*, 465 Mich 575, 640 N.W.2d 246 (2002). Our review is limited to determining whether plain error occurred that affected defendant's substantial rights. *People v. Carines*, 460 Mich 750, 597 N.W.2d 130 (1999).

III. Analysis

Defendant first argues that the prosecutor violated his Fifth Amendment rights by improperly commenting on his failure to volunteer information to the police. We disagree.

The prosecutor stated during closing argument:

> The detective also tells you that the defendant came into the house while she was there, and she indicated to him, you know, "This is why I'm here. I'd like to sit down and I'd like to meet with you." And at that time, he seemed like he wanted to sit and meet with her, and she gave the card to at least one of them, if not both of them [defendant and his wife], saying ["]this is my card with my number on it, please contact me," and that was back on March 23rd of 1998 and here we are today and that card has never been used by [defendant's daughter], not by [defendant's wife], not by [defendant].
>
> And if the defendant has an attorney and wants to communicate through his attorney, and that's what happened within days, the attorney contacted the detective and said, "I represent Ed Shaieb", at that point we are on notice that police officers, prosecutors, any contact that's to be made to the defendant is through his attorney.
>
> However, and, you know, argument will be made, "Well, no, I am the attorney for Ed Shaieb, not for Mary Shaieb or Lindsey Shaieb." So they certainly could have come forward and said, "we want to give this-[.]" [W]e certainly appreciate them coming here yesterday at the eleventh hour

> and say[ing], "These girls have always had problems and they are easily led and that's why this happened." That's very nice that they share that with us today. I wish they had shared that with the detective in the two and a half years that the case has been pending.
>
> And certainly if the defendant had an attorney representing him, he could have certainly had that attorney with him and come into the police station and met with the detective. That never happened.

At this point, defense counsel interjected: "Your Honor, at this time I feel compelled to raise an objection. This jury has to know that my client as absolute has a fifth amendment [sic] here and this has crossed the line."

Outside the jury's presence, the prosecutor argued to the trial court that she was free to tell the jury that defendant could have come in for an interview and that her job was to tell the jury that defendant was "guilty because he didn't sit with that detective and talk to her".

In part, we determine whether the prosecutor's use of the defendant's silence violates the constitution by examining when the referenced silence occurred. See, *People v. Hackett*, 460 Mich 202, 596 N.W.2d 107 (1999). In the instant case, the prosecutor referenced defendant's silence extending from the time Detective Deprez left his home until the time of trial. [FN2]. Because defendant's silence prior to his arrest is not constitutionally protected, *People v. Schollaert*, 194 Mich.App 158, 167; 486 N.W.2d 312 (1992), to the extent the prosecutor referred to the time period before the defendant's arrest, the prosecutor's comment did not violate defendant's Fifth Amendment rights. [FN3]. Rather than raising constitutional issues, the use of pre-arrest silence presents evidentiary issues. *Id.; Hackett, supra* at 213-214. Defendant, however, did not raise an evidentiary objection in the trial court and does not assert one in his statements of questions presented. Thus, we do not need to consider the evidentiary issue. *Busch v. Holmes*, 256 Mich.App 4, 12; 662 N.W.2d 64 (2003).

FN2. Because the prosecutor referred to the defendant's failure to "come into the police station and [meet with the detective,"] it is evident that the prosecutor's reference to the "two and a half years that the case has been pending" did not include defendant's decision to stand mute *at trial*. Use of defendant's silence at trial would have violated defendant's Fifth Amendment right against self-incrimination. *People v. Fields*, 450 Mich 94, 108-109, 538 N.W.2d 356 (1995), citing *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229; 14 L.Ed.2d 106 (1965).

Fne. Defendant relies on *Combs v. Coyle*, 205 F.3d 269 (CA6, 2000) and cases from other federal and state courts for the proposition that a defendant's pre-arrest silence cannot e used as a substantive evidence of guilt. The Court in *Schollaert, supra*, reached the opposite conclusion, relying heavily on Justice Stevens' concurrence in *Jenkins v. Anderson*, 447 U.S. 231, 243-244; 100 S Ct 2124; 65 L.Ed.2d 86 (1980). As Justice Stevens stated,

"When a citizen is under no official compulsion whatever, either to speak or remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether [defendant] was in a position to have his testimony compelled and then asserted his privilege, not simply when was silent. A different view ignores the clear words of the Fifth amendment." [*Schollaert, supra* at 316, quoting *Jenkins, supra.*]

We also find that the reference to defendant's silence from the time of his arrest until trial did not violate defendant's Fifth Amendment right against self-incrimination. [FN4] Contrary to defendant's argument, *People v. Bobo*, 390 Mich. 355, 359; 212 N.W.2d 190 (1973), does not require a different result. Our Supreme Court has severely limited *Bobo*, stating that *Bobo* is "viable only to the extent that it precluded 'impeachment for and comment on silence at the time or arrest in the face of an accusation". ' *Hackett, supra* at 215 n 6, quoting *People v. Collier*, 426 Mich 23, 39; 393 NW2d 346 (1986); *People v. Cetlinski*, 435 Mich

742, 759; 460 NW2d 534 (1990) ("[I[n light of both pre-and post-*Bobo* decisions of the United States Supreme Court, it is clear that the Fifth Amendment rationale no longer supports the *Bobo* rationale".). Additionally the Court has said that *Bobo* is coextensive with federal precedent, and the Michigan constitution is consistent with federal Fifth Amendment and Fourteenth Amendment jurisprudence. *Schoellert, supra,* at 162, citing, *People v. Sutton (After Remand),* 436 Mich 575, 579; 464NW2d 276 (1990); *People v. McReavy,* 436 Mich 197, 201; 462 NW2d 1 (1990); and *Cetlinski, supra* at 759.

> FN4. The record does not indicate when defendant was arrested or for what length of time he was in custody. We refer to his arrest, however, in light of its importance to our analysis. *Hackett, supra.*

Although defendant's right to remain silent in the face of accusation arises under the Fifth Amendment, the prohibition on use of defendant's silence after arrest and receiving *Miranda* [FN5] warnings arises out of the due process clause of the Fourteenth Amendment. [FN7] See *McReavy, supra,* at 218 & n 21, citing *Doyle v. Ohio,* 426 U.S. 610; 96 S Ct 2240; 49 L.Ed.2d 91 (1976) (stating that "it would be fundamentally unfair and a violation of due process" to inform a defendant that he has the right to remain silent and then use his silence against him at trial); and *Wainwright v. Greenfield,* 474 U.S. 294; 106 S Ct 634; 88 L.Ed.2d 623 (1986) (stating that use of post-arrest, post-*Miranda* silence as substantive evidence of sanity violates due process). Defendant briefly mentions that the prosecutor's argument also violated *Doyle,* but does not request relief on this basis. Additionally, defendant did not raise an objection on due process grounds in the trial court. An objection on one ground does not preserve an appeal on other ground. *City of Westland v. Opopski,* 208 Mich .App 66, 72-73; 527 NW2d 780 (1994). Defendant has not cited any viable authority that supports his contention that use of his post-arrest silence also violates the Fifth Amendment. A party may not leave it to this Court to search for authority to support its position. *People v. Harlan (On remand),* ____Mich.App____; ____NW2d ____(Docket 237281, issued 8/14/03) slip op at 1-2, citing *People v. Watson,* 245 Mich.App 572, 587, 629 N.W.2d 411 (2001).

FN5. *Miranda v. Arizona*, 384 U.S. 436; 86 S Ct 1602; L.Ed.2d 694 (1966).

FN6. Despite that the record does not address whether or when defendant received *Miranda* warnings, in the absence of any assertion from defendant to the contrary, we assume for purposes of this analysis that defendant properly received *Miranda* warnings upon his arrest.

FN7. Although the issue whether use of post-arrest post-*Miranda* silence also violates the Fifth Amendment right of self-incrimination was presented to the United States Supreme Court in *Doyle*, the Court did not address the issue. *Doyle, supra* at 616, 626 (Stevens, J., dissenting). The Court in *Wainwright*, in its analysis of substantive use of post-arrest silence, specifically noted that *Doyle* did not rest on a Fifth Amendment analysis, unlike *Griffin*. *Wainwright, supra* at 291, n.7. See also *Dennis, supra*, at 573.

In any event, we would find that the trial court did not abuse its discretion by denying defendant's motion for mistrial. The trial court properly concluded that its instruction to the jury cured any error by the prosecution. Unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions ... and a strong likelihood that the effect of the evidence would be "devastating" to the defendant ...," we presume that the jury complied with the trial court's curative instruction. *Dennis, supra* at 581, quoting *Greer v. Miller*, 483 U.S. 756, 767 n 8; 107 S Ct 3102; 97 L.Ed.2d 618 (1987) (citations omitted). Because defendant's post-arrest silence was "at most 'insolubly ambiguous,'" *Greer, supra* at 767 n 8, quoting *Doyle, supra* at 617, the effect of defendant's post-arrest silence was not devastating.

Accordingly, the trial court reasonably concluded that its instruction cured any error and that declaring a mistrial was not necessary. *Dennis, supra* at 582.

Next, defendant argues that his first-degree CSC conviction is contrary to the great weight of the evidence because the complainant was at least thirteen years old at the time of the offense.

Defendant argues that the complainant's description of the bedroom where the offense occurred is inconsistent with the arrangement of that room before the complainant turned thirteen. Testimony in defendant's case-in-chief showed that the room was renovated in 1995, and receipts for painting supplies and room accessories were admitted to support defendant's contention that the room had been renovated in 1995. By that time, defendant argues, M.S. would have been at least thirteen years old.

Because defendant failed to preserve this issue by raising it in a motion for a new trial, *People v. Winters*, 225 Mich.App 7198, 729; 571 NQ2d 764 (1997), our review is limited to plain error affecting defendant's substantial rights, *Carines, supra* at 763-764. A verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v. McCray*, 245 Mich.App 631, 637, 630 NW2d 633 (2001). "Conflicting testimony, even when impeachment to some extent, is an insufficient ground for granting a new trial". *People v. Lemmon*, 456 Mich 625, 647; 576 N.W.2d 129 (1998).

We find no plain error. Although the complainant's credibility was challenged by the defense, the jury was in a better position to judge credibility of the witnesses. We cannot say that the complainant's testimony was deprived of all probative value or that the jury could not have believed it. *Id.* at 642.

In a related argument, defendant asserts that his trial attorney was ineffective for failing to move for a ne trial on the basis that the great weight of the evidence did not support his conviction. Defendant also argues that his appellate attorneys were similarly ineffective for failing to raise the issue in an appropriate motion.

To prove ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that the defendant was so prejudiced that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 688; 104 S Ct 2052, 80 L.Ed.2d 674 (19840; *People v. Pickens*, 446 Mich 298, 521 NW2d 797 (1994); *People v. Tommolino*, 187 Mich.App 14, 17, 466 NW2d 315 (1991). Because defendant did not move for a *Ginther* [FN8] hearing, our

review of this issue is limited to mistakes ajparent from the record. *People v. Rodriguez*, 251 Mich.App 10, 38, 650 NW2d 96 (2002).

FN8. *People v. Ginther*, 390 Mich 436, 443; 212 N.W2d 922 (1973).

The record does not indicate why defendant's attorneys failed to contest the weight in the evidence in an appropriate motion. Furthermore, as we have already determined, the jury was in a better position to judge the credibility of the trial witnesses. The trial judge may not sit as a "thirteenth juror" to veto the jury's verdict, *Lemmon, supra* at 636. Considering the trial court's limited role in revieing the jury's determination of credibility, we cannot say that a motion for a new tiral on this ground would have been successful. Therefore, defendant has not established that he was prejudiced by his attorneys' failures to raise this issue.

Finally, defendant argues that his sentences for his second-degree CSC convictions involving N.J. are invalid because the trial court did not prepare a Sentencing Information Report ("SIR") for those two convictions. An SIR report was prepared for the highest offense of which the jury convicted defendant, first-degree CSC. Defendant argues that an additional SIR for the two convictions involving N.J. would show a recommended minimum sentence for second-degree CSC between one and three years. On this basis, defendant argues that the trial court failed to sentence him within the appropriate range and failed to articulate reasons for departing from the appropriate range. He also argues that the sentences imposed are disproportionate.

Defendant did not object in the trial court on the absence of an SIR for the convictions involving N.J. Accordingly the scope of our review is governed by *Carines, supra*. *People v. Kimble*, 252 Mich.App 269, 275; 751 NW2d 798 (2002). We find no plain error affecting defendant's substantial rights.

Because the offenses were committed before January 1, 1999, the former judicial sentencing guidelines apply. MCL 769.34(1); *People v. Reynolds*, 240 Mich.App 250, 253, 611 NW2d 316 (2000). In instances of multiple convictions, the judicial sentencing guidelines require the preparation of an SIR only for the high-

est convicted offense. Michigan Sentencing Guidelines, 2d ed (1988), p. 1, general instruction B(4). The instructions do not require a different procedure for multiple convictions that arise from separate complaints that were joined for trial. Accordingly, the trial court did not err by preparing an SIR only for the first-degree CSC conviction.

We need not address defendant's claim that his second-degree CSC sentences involving N.J. are disproportionate. See, *People v. Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Those sentences are to be served concurrent to the eight to twenty year sentence for first-degree CSC. Accordingly, the sentences do not affect defendant's substantial rights. *People v. Sharp*, 192 Mich.App 501, 506; 481 NW2d 773 (1992).

Affirmed.

FITZGERALD concur in result only.

APPENDIX B

MICHIGAN SUPREME COURT
Lansing, Michigan

ORDER

Entered: June 10, 2004

124938

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee

SC. 124938
COA: 232957
Macomb CC 99-0729-FC
99-0730-FC

vs.

EDWARD MICHAEL SHAIEB,
Defendant-Appellee

----------/

On order of the Court, the application for leave to appeal the September 9, 2003 judgement of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanaugh and Kelly, JJ., would grant leave to appeal.

APPENDIX C

STATE OF MICHIGAN
COUNTY OF MACOMB

COMPLAINT
FELONY

Case No. 99-0729-FC

Date: On or about
10/15/93/SPRING 94

THE PEOPLE OF THE STATE OF MICHIGAN V. EDWARD MICHAEL SHAIEB

COUNT 1: Defendant(s) 01 CRIMINAL SEXUAL CONDUCT-FIRST DEGREE (PERSON UNDER 13) did engage in sexual penetration to-wit: digital/vaginal with Mariana Slicker, said person being under 13 years of age: contrary to MCL 750.520(b)(1)(a); MSA 28.788(2)(1)(a) [750.520B1A]

FELONY: Life or any term of years: Mandatory AIDS/STD testing

COUNT 2: Defendant(s) 01 CRIMINAL SEXUAL CONDUCT-SECOND DEGREE (PERSON UNDER 13) did engage in sexual contact with another person, to-wit: Mariana Slicker, said person being under 13 years of age, contrary to MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). [750.520C1A]

FELONY: 15 years; Mandatory AIDS/STD testing.

APPENDIX D

STATE OF MICHIGAN
COUNTY OF MACOMB

COMPLAINT
FELONY

Case No. 99-0730-FC

Date: On or about
10/15/93/SPRING 94

THE PEOPLE OF THE STATE OF MICHIGAN V. EDWARD MICHAEL SHAIEB

COUNT 1: Defendant(s) 01 CRIMINAL SEXUAL CONDUCT-SECOND DEGREE (PERSON UNDER 13) did engage in sexual contact with another person, to-wit: Nicole Jacobs, said person being under 13 years of age, contrary to MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). [750.520C1A]

FELONY: 15 years; Mandatory AIDS/STD testing.

COUNT 2: Defendant(s) 01 CRIMINAL SEXUAL CONDUCT-SECOND DEGREE (PERSON UNDER 13) did engage in sexual contact with another person, to-wit: Nicole Jacobs, said person being under 13 years of age, contrary to MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). [750.520C1A]

FELONY: 15 years; Mandatory AIDS/STD testing.

APPENDIX E

Michigan Criminal Jury Instructions

CJI2d 20.1
Criminal Sexual Conduct in the First Degree

(1) The defendant is charged with the crime of first-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following beyond a reasonable doubt:

(2) That the defendant engaged in a sexual act that involved:

entry by [any part one person's body...into the genital or anal opening of another person's body. Any entry, no matter how slight, is enough. It is alleged in this case that a sexual act was committed by the defendant's finger entering the complainant's vagina. It does not matter whether the sexual act was completed or whether semen was ejaculated.

(3) Age of complainant was under 13. See CJI2d 20.3

APPENDIX F

Michigan Criminal Jury Instructions

CJI2d 20.2
Criminal Sexual Conduct in the Second Degree

(1) The defendant is charged with the crime of second-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following beyond a reasonable doubt:

(2) First, that the defendant intentionally touched the complainant's buttock or the clothing covering that area.

(3) Second, that the act was done for sexual purposes or could be reasonably construed as having been done for sexual purposes.

(4) Third, that the complainant was under the age of 13. See CJI2d.20.3

APPENDIX G

Michigan Criminal Jury Instructions

CJI2d 20.3

Complainant under Thirteen Years of Age

That complainant was less than thirteen years old at the time of the alleged act.

APPENDIX H

Michigan Sentencing Guidelines-Criminal Sexual Conduct

PRV 1 PRIOR HIGH SEVERITY CONVICTIONS

50 2 or more prior high severity felony convictions

25 1 prior high severity felony conviction

0 No prior high severity felony convictions.

PRV 2 PRIOR LOW SEVERITY FELONY CONVICTIONS

40 3 or more prior low severity felony convictions

25 2 prior low severity felony convictions

10 1 prior low severity felony conviction

0 No prior low severity felony convictions

PRV 3 JUVENILE-HIGH SEVERITY ADJUDICATIONS

25 2 or more prior high severity juvenile adjudications

10 1 prior high severity juvenile adjudication

0 no prior high severity juvenile adjudications

PRV 4 JUVENILE-LOW SEVERITY ADJUDICATIONS

10 4 or more prior low severity juvenile adjudications

5 2 or 3 prior low severity juvenile adjudications

0 0 or 1 prior low severity juvenile adjudications

PRV 5 PRIOR MISDEMEANOR CONVICTIONS

10 4 or more prior misdemeanor convictions

5 2 or 3 prior misdemeanor convictions

0 0 or 1 prior misdemeanor convictions

PRV 6 PRIOR RELATIONSHIP TO CRIMINAL JUSTICE SYSTEM

15 Post-Conviction relationship exists or the offender committed the instant offense within six months of termination of parole or probation

5 Other relationship exists

0 No relationship exists

PRV 7 SUBSEQUENT/CONCURRENT FELONY CONVICTIONS

20 2 or more subsequent concurrent convictions

10 1 subsequent/concurrent convictions

0 No subsequent/concurrent convictions

PRIOR RECORD LEVELS

SCORE	LEVEL
0	A
1-24	B
25-49	C
50+	D

OFFENSE VARIABLES - CRIMINAL SEXUAL CONDUCT

OV 1 AGGRAVATED USE OF A WEAPON

25 A firearm is discharged by offender during commission of the offense

15 A firearm pointed toward victim or touching with another weapon

5 A firearm displayed, implied, or possessed: any other weapon displayed

0 No firearm discharged, displayed, implied, or possessed; no other weapon

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OV-2 PHYSICAL ATTACK OR INJURY

100 Victim Killed

50 Victim treated with excessive brutality

25 Bodily injury and/or subjected to terrorism

0 No injury

OV-3 VICTIM WAS CARRIED AWAY OR HELD CAPTIVE

15 Victim was moved to another place of greater danger or to a situation of greater danger, or was held captive significantly beyond that which was necessary to commit the offense

0 Victim was not carried away or held captive

OV-6 MULTIPLE VICTIMS

100 Multiple deaths

10 2 or more victims

0 Not a multiple victim situation

OV-7 OFFENDER EXPLOITATION OF VICTIM VULNERABILITY

15 Offender exploits the victim due to a physical disability, mental disability, youth, agedness, or an abuse of authority status

5 Offender exploits the victim through a difference in size/strength, or because the victim was intoxicated, under the influence of drugs, asleep, or unconscious

0 No exploitation

OV-9 OFFENDER'S ROLE

10 Leader in a multiple offender situation

0 Not a leader

OV-12 CRIMINAL SEXUAL PENETRATIONS

50 2 or more criminal sexual penetrations

25 1 criminal sexual penetration

0 No criminal sexual penetration

Note: Do not count the penetration that is the basis for the conviction

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OV-13 PSYCHOLOGICAL INJURY TO VICTIM

5 Serious psychological injury to victim or victim's family necessitating professional treatment

0 No psychological injury

OV-25 CONTEMPORANEOUS CRIMINAL ACTS

15 3 or more contemporaneous criminal acts

5 2 contemporaneous criminal acts

0 0 or 1 contemporaneous criminal act

CRIMINAL SEXUAL CONDUCT
OFFENSE VARIABLE LEVELS

SCORE	LEVEL
0-9	I
10-24	II
25-49	III
50+	IV

LIFE

Prior Record Level

Offense Level	A	B	C	D
I	12-72	24-84	60-120	72-180
II	24-96	36-96	96-240	120-300

III	60-120	96-180	120-300	180-360 Or life
IV	96-240	120-300	180-360 Or life	240-480 or life

750.520b Criminal Sexual Conduct, 1st

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180 MONTHS CSC 2ND

Prior Record Level

Offense Level	A	B	C	D
I	0-24	0-36	12-48	24-96
II	0-36	12-36	36-96	48-120
III	12-48	24-60	48-120	60-120
IV	24-60	36-84	60-120	72-120

750.520C Criminal Sexual Conduct, 2nd

APPENDIX I

Sentencing Recommendations
Probation Officer-First Sentencing

RECOMMENDATION:

Defendant: Edward Michael Shaieb
Docket No: 99-0729-FH & 99-0730-FH

Docket #99-0729-FH:

Count I:

1. The Probation Department recommends that the defendant be committed to the custody of the Michigan Department of Corrections for eight years to 20 years. Credit for 42 days.

2. The defendant shall pay restitution of an amount to be determined as a condition of parole.

3. The defendant shall pay $60 to the Crime Victim's Right Fund.

SENTENCE GUIDELINE RANGE:
96 MONTHS TO 180 MONTHS

Count II:

1. The Probation Department recommends that the defendant be committed to the custody of the Michigan Department of Corrections for eight years to 20 years. Credit for 42 days.

Docket #99-0730-FH:

1. The Probation Department recommends that the defendant be committed to the custody of the Michigan Department of Corrections for eight years to 15 years on both counts. Credit for 42 days.

2. The defendant shall pay restitution of an amount to be determined as a condition of parole.

3. The defendant shall pay $60 to the Crime Victims Right Fund.

APPENDIX J

EXCERPT FROM SENTENCING PROCEEDING
JANUARY 18, 2001

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff Case No. 99-0729-FC
99-0730-FH

vs.

EDWARD MICHAEL SHAIEB

----------/

SENTENCE

Before the Honorable Mary A. Chrzanowski, Circuit Judge, on January 18, 2001, at 40 North Main, 4th Floor, Macomb County Court Building, Mt. Clemons, Michigan.

APPEARANCES:

NIDA SIMONA,

Appearing on behalf of the People

STEPHEN RABAUT
JAMES HEUER

Appearing on behalf of the Defendant

COURT CLERK: Recalling People versus Shaieb

MS. SAMONA: Good morning, again, Judge. Nida Samona on behalf of the People.

MR. RABAUT: Good morning, your Honor. May it please the Court, Stephen Rabaut, appearing on behalf of Edward Shaieb, who's present with me in Court

MR. HEUER: Your Honor, James Heuer, appearing as co-counsel.

MS. SAMONA: Today's the day for sentencing for Mr. Shaieb, your Honor. He has two files before this Court. This matter went to jury trial. In regards to File Number 99-729-FC, Mr. Shaieb was found guilty by a jury of his peers on both counts. That's one count of criminal sexual conduct in the first degree and one count of criminal sexual conduct in the second degree with a person under 13 years of age. In regards to File No. 99-730-FH, Mr. Shaieb was found guilty by a jury of his peers as to both counts there and that is two counts of criminal sexual conduct in the second degree with a person under 13 years of age.

MR. RABAUT: Okay. Judge, pertaining to section two, where it says two of four, on the second page of the basic information report it shows the sentencing guideline range of 96-180 months. This is a miscalculation. I think the - the author of the pre-sentence report just made an error and the guideline range he showed for criminal sexual conduct second degree, my understanding was 24 to 60 months and that should be reflected at that location.

THE COURT: Okay, Ms. Molly:?

PROBATION DEPT: Your Honor, and it would appear that we weren't consistent on this, because on one point we put 96 to 180 for the CSC-2nd and then if you look down at three of four it says 24 to 60. However, and I could be wrong, but from my memory of how the old sentencing guideline range worked, when we calculated the old sentencing guideline range and there were several counts you were to take the count with the highest max, figure out the guideline range for that count and that guideline range was to apply to all the other counts. You did not do an individual guideline

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THE COURT: It is the sentence of the Court as to Docket Number 99-0730-FH that you be committed to the Michigan Department of Corrections for a period of five to 15 years. That's on both counts and both sentences will run con-

current. That you be given credit for 42 days and that you pay a sixty dollar Crime

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THE COURT, CONT. Victims Rights Service Fund Fee.

As to Docket Number 99-0729-FH, it is the sentence of the Court that you serve nine to 20 years in the custody of the Michigan Department of Corrections. That you be given credit for 42 days. That you pay any restitution that may be entitled to the victim, and that you pay sixt dollars to the Crime Victim Rights Service Fund.

In determining the sentence for this defendant, the Court has considered that this claim or punishment of the wrongdoer, the protection of society, the potential for rehabilitation of the defendant , the deterring of others from committing like offenses. You are entitled to appellate review of your conviction and sentence. If you are financially unable to retain an attorney, the Court will appoint an attorney to represent you on appeal and your request for an assistance of counsel must be made within 42 days. My clerk is going to hand to your attorney, who will hand to you a form, which is called a Notice of Right to Timely Appeal. Have you received the form?

MR. SHAIEB: Yes.

MR. RABAUT: Your - your Honor, I don't think the Court

pronounced sentence on count two of the second file?

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MS SAMONA: That's correct. On -on the CSC-1st you said nine to 20.

THE COURT: Right. Count two on File Number 99-0729 also would be five to 15 years and that would be in accordance with File Number 99-07300, the two counts of criminal sexual conduct in the second degree. Both - all four charges run concurrent to each other.

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APPENDIX K

OPINION AND ORDER RE: GUIDELINE SCORING ERROR AND RE-SENTENCING

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff

Case Nos. 99-0729-FC
99-0730-FH

vs.

EDWARD M. SHAIEB,

Defendant

----------/

OPINION AND ORDER

This matter is before the Court on defendant's motion for resentencing.

In Case No. 99-0729-FC, defendant was charged with and convicted of one count of first degree criminal sexual conduct ("CSC") and one count of second degree CSC as to complainant Mariana Slicker. In Case No 99-0730-FH, he was charged with and convicted of two counts of second degree CSC as to complainant Nicole Jacobs. He was sentenced to the following: (1) 9 to 20 years on the first degree CSC conviction in Case No. 99-0729-FC; (2) 5 to 15 years on the second degree CSC conviction in Case No.

99-0730-FC, and (3) 5 to 15 years on each of the second degree CSC convictions in Case No. 99-0730-FH.

The Sentencing Information Report ("SIR") as to the first degree CSC conviction gave defendant a total Prior Record Variable ("PRV") of 20 points and an Offense Variable ("OV") of 30 points, 10 of which were attributed to OV number 6 ("OV 6"). Under the sentencing guidelines that were then in effect, OV 6 went to th enumber of victims. The 30-point OV score fell within the 25-49 point rane of Level III of the Offense Severity Level ("OSL") which resulted in a sentencing guideline range of 96-180 months. Likewise, the SIR as to the second degree CSC conviction gave defendant a PRV of 20 points. Further, he was given a total OV score of 25 points, 10 of which were assigned to OV 6. Defendant once again feel within Level III of the OSL range, this time with a sentencing guideline of 24 to 60 months.

At the sentencing hearing, defendant's counsel did not object to the manner in which OV 6 had been scored;[1] However, he did point out other minor errors in the SIRs. Defendant subsequently filed an appeal, which is currently pending. Pursuant to MCR 7.208(B)(1), defendant is permitted to seek resentencing during the pendency of his appeal.

In the motion at hand, defendant argues that the OV 6 score should have been zero rather than 10 points in each of the cases against him.[2] More specifically, he contends that in scoring OV 6, the Probation Department had mistakenly assumed that there had been multiple victims[3] in each case where that had actually been

[1]Defendant maintains that the Court need not address the issue of ineffective assistance of counsel to reach the sentencing issue. See defendant's motion at paragraphs 8-9.

[2]According to defendant, an OV 6 score of zero would result in a point range which would place him in Level II of the OSL in both cases. He maintains that the new sentencing range for the first degree CSC conviction in Case No. 99-0729-FC would thus be 36 to 96 months and that the new sentencing range for the second degree CSC conviction in Case No. 99-0730-FH would thus be 12 to 36 months. See defendant's proposed SIRs at Exhibit F to his brief.

[3]However, he concedes that the Probation Department had correctly scored the PRV at 20 points to reflect that he had been concurrently convicted of felonies against Marianna Slicker and Nicole Jacobs. See defendant's brief at 3.

two victims in two cases that should have been scored separately. Conversely, the prosecution asserts that the present OV 6 scores are correct inasmuch as there were multiple victims in the charged offenses.

After careful consideration, the Court is persuaded that defendant's request for a recalculation of his OV 6 scores should be granted.

At the outset, OV 6 has been subject to the following judicial interpretation:

> ...Offense Variable 6 does not necessarily require a contemporaneous criminal act. The instructions for Offense Variable 6 provide that a victim is each person who is placed in danger of injury or loss of life. It does not necessarily require that a separate criminal offense have occurred with respect to that victim. For example, in a robbery, the defendant may rob only one victim, but scoring Offense Variable 6 for multiple victims is nevertheless appropriate because there are other individuals present at the scene of the robbery who were, therefore endangered...
>
> Accordingly, for the above reasons, we conclude that the trial court erred in scoring ten points for Offense Variable 6. Because there was only one victim involved in the criminal transaction for which defendant was convicted, Offense Variable 6 should be scored as zero. *People v. Chesebro*, 206 Mich App 468, 473, 522 NW2d 677 (1994).

In the present controversy, the prosecution does not point to any evidence showing that defendant had perpetrated a crime against Mariana Slicker while Nicole Jacobs had been present or that he had committed a crime against Nicole Jacobs while Marian Slicker had been present. Under these circumstances, the Court cannot liken the victims at issue to bystanders at a robbery. *See, Chesebro, supra.* Instead, the Court is satisfied that there had been only one victim in each of the cases at hand. Contrary to the prosecution's assertion, it is not sufficient that the cases were merely tried together. Accordingly, the Court concludes that OV 6 should

have been scored at zero in each of the defendant's cases. *Id.*

Consistent with the above ruling, the Probation Department shall prepare a revised SIR with an OVR 6 score of zero for each of the two cases at issue. Thereafter, the Court shall resentence defendant in accordance with the revised scores.

For the reasons set forth above, defendant's motion for resentencing is **GRANTED.** In compliance with MCR 2.602(A)(3), the Court finds that this decision does not resolve the last pending issue and does not close the case.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that re-sentencing in this matter shall be and hereby is scheduled for **Wednesday, August 22, 2001, at 8:30 a.m.**

Mary A. Chrzanowski
Circuit Court Judge

Dated: July 3, 2001

APPENDIX L

Recommendations of the Probation Office
Re: Re-Sentencing After Offense Variables
Were Re-Scored

RECOMMENDATION:

Defendant: Edward M. Shaieb
Docket No. 99-0729FC 99-0730-FC

Docket #99-0729 FC-Count I

1. The Michigan Department of Corrections recommended that the defendant be committed to the custody of the Michigan Department of Corrections for 8-20 years, credit for 238 days.

2. The defendant shall pay restitution in the amount of $695 as follows: condition of parole.

3. The defendant shall pay a Crime Victim's Assessment in the amount of $60 as ordered by the Court.

4. Criminal Sexual Conduct Registration required.

SENTENCE GUIDELINE RANGE: 36-96 MONTHS

Docket #99-0729-FC-Count II

1. The Michigan Department of Corrections recommends that the defendant be committed to the custody of the Michigan Department of Corrections for 5-15 years, credit for 238 days.

SENTENCE GUIDELINE RANGE: NOT APPLICABLE

Docket #99-0730-FC-Counts I and II

1. The Michigan Department of Corrections recommends that the defendant be committed to the custody of the Michigan Department of Corrections for 5-15 years, credit for 238 days.

2. The defendant shall pay a Crime Victim's Assessment in the amount of $60 as ordered by the Court.

3. Register as a Sex Offender.

SENTENCE GUIDELINE RANGE: NOT APPLICABLE

APPENDIX M

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states in relevant
part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him...